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CPLR 7510: United States Treaty Does Not Supplant the Common Law

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In *Robbins v. Goldstein*,[218] the appellate division reversed a lower court determination holding that, although the *lis pendens* was more than three years old, a court, in its discretion, could deny a CPLR 6514 motion to cancel. Indeed, it was concluded that CPLR 6513 actually mandated such cancellation.[219]

Although CPLR 6514(b) allows a court certain discretion when confronted with a motion to cancel, the clear and unequivocal wording of 6513 appears to constitute an exception to such latitude. Moreover, 6514(b) pertains to a *lis pendens* which is not more than three years old and was clearly intended to encompass those instances where a "neglect to prosecute" or the lack of a "good faith pursuit" might require cancellation.[220] The *Robbins* decision clearly demonstrates that CPLR 6513 is self-executing;[221] plaintiffs *must* move to extend the notice of pendency before the expiration of the three-year period if they wish to give valid constructive notice to potential purchasers or encumbrancers.

ARTICLE 75 — ARBITRATION

CPLR 7510: United States treaty does not supplant the common law.

In *Engelbrechten v. Galvanoni & Nevy Bros., Inc.*,[222] a German national sought enforcement of a German arbitration award pursuant to CPLR 7510. According to a treaty between the United States and Germany, awards in arbitration "which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in . . . the courts of either party. . . ."[223] The defendant, however, argued that the award, although final, was unenforceable in Germany because

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218 32 App. Div. 2d 1047, 303 N.Y.S.2d 822 (2d Dep't 1969).

219 The courts, in analyzing a similar provision in CPA 121(a), held that the expiration of three years mandated cancellation and that the section was self-executing. Carvel-Dari-Freeze Stores, Inc. v. Lukon, 219 N.Y.S.2d 716 (Sup. Ct. Suffolk County 1961), *modified*, 18 App. Div. 2d 700, 236 N.Y.S.2d 374, 239 N.Y.S.2d 889 (2d Dep't 1963).

220 *See* Sunshine v. Ainspan, 39 Misc. 2d 292, 240 N.Y.S.2d 449 (Sup. Ct. Albany County 1962). *See also* 7A WK&M ¶ 6514.10 (1969).

221 CPLR 6512 similarly mandates that if a *notice of pendency* is filed before an action is commenced it is effective only if service is perfected within 30 days. The second department construed this provision's predecessors (CPA 120 and 123), as imposing an obligation upon the court to cancel unless the filing party specifically conformed to the requirement. *See* Langoff v. Bader, 13 App. Div. 2d 995, 216 N.Y.S.2d 632 (2d Dep't 1961).

It is also interesting to note section 17 of the Lien Law which states that no lien shall be effective for more than one year unless extended by the court. N.Y. LIEN LAW § 17 (McKinney 1965). In *In re* Bullock, 129 N.Y.S.2d 360 (Sup. Ct. Kings County 1954), the court reasoned that this provision was also self-executing and, hence, the lien automatically lapsed.

222 59 Misc. 2d 721, 300 N.Y.S.2d 239 (N.Y.C. Civ. Ct. N.Y. County 1969).

223 Friendship, Commerce and Navigation Treaty with the Federal Republic of Germany, Oct. 29, 1954, [1956] 2 U.S.T. 1839, T.I.A.S. No. 3593 (effective July 14, 1956).

the plaintiff did not follow the procedural requirements for *enforcement* by the German courts;[224] he therefore contended that the New York courts could not confirm the award since it was inconclusive in New York within the meaning of the treaty.

Judge Stecher reasoned that a treaty has the same effect on the common law as a federal statute; therefore, there is no presumption that it preempts the laws of the state unless its language expressly or impliedly mandates that result. In the court's view, the treaty in question merely set forth the *minimum* standards for confirmation of foreign awards. In other words, awards meeting the treaty terms must be confirmed. However, as indicated, the common law remains intact, and under New York law, foreign awards, like foreign judgments, are recognized and deemed conclusive unless the foreign tribunal lacked jurisdiction of the person or the subject matter, or a fraud was perpetrated on the court.[225] In the absence of proof of any of these three defects the *Engelbrechten* court ordered enforcement of the award.[226]

Domestic Relations Law

DRL § 81: Mother liable in part for counsel fees arising from habeas corpus proceeding brought to determine child's custody.

DRL section 81 decrees that "[a] married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them."[227] However, this statutory prescription fails to specify what "powers, rights and duties" it is intended to encompass. For instance, can a mother ever have a "duty" to pay counsel fees incurred in her child's behalf in light of the fact that an expense of that nature is a necessary?[228] The DRL seemingly suggests that this question should be answered in the negative. For, sections 237 and 240 of the DRL, dealing with counsel fees and expenses, and custody and maintenance of children, respectively, expressly provide for payment of

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224 It was contended that the plaintiff could not obtain execution in Germany until: (1) a court had certified the award, and (2) the defendant had an opportunity to file objections.

225 *See* 8 WK&M ¶ 7510.15 (1968).

226 The court granted a sixty-day stay to enable the defendant to protest the award before the German courts. *Cf. In re* Overseas Distrib., 5 App. Div. 2d 498, 499, 173 N.Y.S.2d 110, 112 (1st Dep't 1958), where the court stated: "We recognize that an award may be deemed to be final if all that remains to be done are ministerial acts or arithmetical calculations."

227 Dom. Rel. Law § 81 (McKinney 1964).

228 Friou v. Gentes, 11 App. Div. 2d 124, 126, 204 N.Y.S.2d 836, 838 (2d Dep't 1960): "Legal services rendered for a wife or child are necessaries."; Gutterman v. Langerman, 2 App. Div. 2d 63, 153 N.Y.S.2d 113 (1st Dep't 1956).